MALAYAN BANKING BHD

v.

MAHMOOD ZUHDI HJ MOHD NOOR

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CIVIL ACTION NO: 22-17-1993]
25 MARCH 2001

CIVIL PROCEDURE: *Judgment - Default of appearance - Setting aside - Whether judgment in default of appearance order a nullity due to bad service - Service - Substituted service - Whether service at defendant's last known address tantamount to bad and irregular service - Whether there was a proper court order to do so*

CIVIL PROCEDURE: *Default judgment - Setting aside - Application for - Whether must be filed and served within thirty days of receipt of order or judgment - Rules of the High Court 1980, O. 42 r. 13 - Whether application to set aside defective due to its delay - Whether there was satisfactory explanation for the delay - Whether the court could invoke its inherent power*

The plaintiff filed a writ of summons and it was served on the defendant by way of substituted service. However, the defendant did not enter appearance, hence prompting the plaintiff to enter a judgment in default of appearance (JID). More than six years later, the defendant filed a summons-in-chambers asserting that the JID order was a nullity and must be set aside as it was obtained through a bad and irregular service. The senior assistant registrar dismissed the application. Hence, the defendant filed a notice of appeal.

The plaintiff raised a preliminary objection, submitting that the defendant's application was long overdue *ie* more than six years after the JID had been entered and served on the defendant and that it was defective as it rebelled against O. 42 r. 13 of the Rules of the High Court 1980 (RHC). Therefore the defendant's application should be dismissed.

Held:

[1] The writ was served on the defendant by way of substituted service (SS), *ie*, through posting the said summons at the defendant's last known address, as per the address on the summons and not as provided for in the agreement, by reason of there being a proper court's order to do so. With it being a good court order, and unless and until set aside, that order

must stand and must be obeyed to the letter. With the SS order being good and with the JID being founded on it, the latter thus must still remain good and regular.

[2] Order 42 r. 13 RHC provides that a party intending to set aside or to vary such order or judgment must make his application to the court, and serve it on the party who has obtained the order or judgment within 30 days after the service of the order or judgment on him. This stringent requirement must be adhered to. However, in this case, the aggrieved party was out of time.

[3] To invoke the court's inherent power to set aside such judgment, be it a nullity or a mere irregular one, the reasons for the delayed application must be scrutinised with a fine toothcomb. The defendant had not come up with a satisfactory explanation for the delay of having left the judgment undisturbed for six long years. The delay was purely self-inflicted, the outcome of unreasonable procrastination. Justice is not only the domain of a defaulting defendant, but also the plaintiff's.

[Defendant's application dismissed with costs.]

Case(s) referred to:

Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor & Another Appeal [1996] 1 CLJ 141 ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 3 r. 5, O. 13 r. 8, O. 42 r. 13, O. 56 r. 1

Rules of the High Court (Amendment) Rule 1993, O. 42 r. 13

For the plaintiff - M/s Lua & Mansor

For the defendant - M/s Zainal & Mariani

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar J:

Sometime on 11 January 1993 the plaintiff had filed a writ of summons against the defendant at the High Court. On 10 October 1993 it was served on the defendant by way of substituted service, ie, by posting the said writ at the defendant's last known address. The defendant however did not enter appearance, hence prompting the plaintiff to enter a judgment in default of appearance (JID) against the defendant on 12 December 1993.

The defendant however made no effort to have the JID against him set aside until more than six years later, when he through his counsel filed a summons-in-chambers (encl. 10). The premise of the application was that as the service was bad, it being served at the last known address instead, the JID order thus was a nullity and must be set aside. The application was first heard before the senior assistant registrar, and upon hearing the application dismissed it thus leaving the JID unscathed.

Being dissatisfied with that decision the defendant again through his counsel filed a notice of appeal to the judge in chambers (encl. 15). At the commencement of the hearing of the notice of appeal before me, the plaintiff's counsel had raised a preliminary objection, stating that the defendant's application in encl. 10 was defective as it rebelled against O. 42 r. 13 of the Rules of High Court 1980, which provides:

> where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or vary such order or judgment must make his application to the Court and serve it on the other party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

Adverting to the above provision, the plaintiff's counsel adamantly submitted that the defendant's application was long overdue, ie, more than six years after the JID had been entered and served on the defendant. He contended that the application should therefore be dismissed, without the necessity of any consideration of the merits of the case. In a gist therefore, I had to consider, *inter alia*, whether I was endowed with the statutory powers or alternatively possessed the inherent jurisdiction to have the order set aside, in the circumstances of the case.

As the matter under discussion concerned an order of JID of appearance, O. 13 is of significance particularly O. 13 r. 8 of the Rules of High Court, as the defendant had wanted to set aside that order. This sub-rule reads:

> 8. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

Perusing O. 13 it is indisputable that this provision is silent on the time frame factor, particularly as to when a party should take steps to set aside that order. Be that as it may, O. 42 r. 13 Rules of the High Court (Amendment) Rule 1993, (effective 1993) provides that a party intending to set aside or to vary such order or judgment must make his application to the court, and serve it on the party who has obtained the order or judgment, within 30 days after the service of the order or judgment on him. Since a judgment in default of appearance order may be set aside, as permitted by O. 42 r. 13, the stringent

requirement of making the application and serving it on the party who has obtained the judgment within thirty days after receipt of the order or judgment, must be adhered to. But what if an aggrieved or interested party were to be out of time, as in this case, what then should it do? I was painfully aware of the fact too that this sub-rule had not provided for any provisions for any extension of time, for purposes of abridgment of time. After due deliberation, I was of the opinion that an interested party in such a predicament could advert to O. 3 r. 5 of the Rules of the High Court, to extend the time but subject to an application. In the current case, as no application was made pursuant to the latter sub-provision, purposefully to abridge the period prescribed under O. 42 r. 13, the statutory remedy available to the defendant therefore had slipped away. The residual remedy that could possibly assist the defendant was my inherent powers, as laid down in *Tuan Hj Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad (infra*).

A scrutiny of exh. "AW-1" in encl. 12, a letter from the plaintiff to the defendant dated 8 February 1994 revealed a covering letter enclosing a copy of the JID meant for the defendant. This fact, *prima facie* proved that the defendant did receive a copy of the JID order, and thus could not deny that he had knowledge of it way back in 1994.

Needless to say, due to the nature of the matter at hand, a scrutiny of the words found in held 6 in the case of *Tuan Hj Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd* [1996] 1 MLJ 30, which emanated from a Federal Court's decision will be necessary. It reads:

> In this case, the delay was not fatal to the applicant's application *since the default judgment was* by reason of uncertainty, was a *nullity*. Under the court's inherent jurisdiction to prevent abuse of its proceedings, *the court has power to set aside the judgment in default, despite the appellant's application being out of time* (emphasis mine).

A brief reading will reveal that if the default judgment were a nullity, then the court possessed the power to have such order be set aside, even if the application were made out of time. Interestingly enough, nothing was said of the court's power with regard to a default judgment that could be categorised as not a nullity. As far as I was concerned, regardless of the quality of a JID order be it a nullity or a mere irregular one, the court could set aside such judgment, even though out of time. But it is my view that to invoke that inherent power, the court must scrutinise the matter with a fine toothcomb, especially the reasons for the delayed application. Nothing should be implanted in the mind of a defaulting litigant, that exploiting the subjective sensitivities of a judge could circumvent mandatory statutory provisions.

With the legal premises established, regardless of the delay, should I have immediately acquiesced to the assertion of the defendant that as the service was bad, the JID order thus was nullified and hence must be set aside? In other words the defendant had wanted me to go behind the judgment, ie, all the way back to the early stages of the action. In his submission the defendant's counsel ventilated that the judgment was bad, as said above, on the premise that it was obtained through a bad and irregular service of the writ of summons on the defendant. He alleged that the writ was served at an address different to the one that appeared in the agreement. Having scrutinised the evidence, I had to agree that the writ was indeed served on the defendant by way of substituted service (SS), ie, through posting the said summons at the defendant's last known address, as per the address on the summons and not as provided for in the agreement. Further, I was convinced that the writ was served by way of SS at that address, by reason of there being a proper court's order to serve the writ at that last known address (encl. 5, per order dated 9 September 1993). As far as I was concerned, with it being a good court order, and unless and until set aside, that order must stand and must be obeyed to the letter, if resorted to.

In support of my view, I refer to the case of *Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor & Another Appeal* [1995] 3 MLJ 472, where the Supreme Court decided, as seen in held 1:

> The order of substituted service of the High Court must be obeyed save in a few exceptions and its validity can only be challenged by proceedings instituted for the very purpose. It cannot be challenged collaterally in other proceedings. Here, the judge had obviously considered the validity of the order of the substituted service when it was not a subject matter of an application for its discharge and made the error of adjudicating on its validity in proceedings which were not filed for the purpose of setting aside the order or service in pursuance thereof ... .

In deference to the above decision, the defendant thus should have initiated a separate proceeding first, of setting aside the SS order, as otherwise that latter order still subsisted. With the SS order being good and with the JID being founded on it, the latter thus must still remain good and regular. The applicant defendant here had erroneously raised the irregularity issue of the SS order at the setting aside application, when such matters should have been dealt with first in another action altogether.

With the issue of improper service out of the way, I now deal with the question as to whether the issue of delay could be ignored and waived, bearing in mind it being a JID of appearance order *per se*, one not based on the merits of the case. I appreciated the fact as admitted above, that there are prevailing

authorities, which support the contention of the defendant. Having said that, I was also aware of the plaintiff's predicament, ie, of being caught by surprise by this unexpected application, after the defendant had left the judgment to remain undisturbed for six long years. It is trite law that any action to be undertaken, must be timeously done, especially if no specific time frame is supplied by Parliament.

In *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396, the Court of Appeal at held 1 and 2 had this to say:

> It is the cardinal principle of law, that when a litigant seeks the intervention of the Court in a matter that affects his rights, he must do so timeously. In all cases in which delay in approaching the Court is in issue, the burden is upon the litigant who has delayed to *render a satisfactory explanation for it* (emphasis mine).

Guided by the remarks of the above case, I had sifted through the evidence to see whether the defendant had managed to come up with a satisfactory explanation for the delay. I found none. The defendant's counsel failure left me with the impression that the delay was purely self-inflicted, the outcome of unreasonable procrastination. Apart from the period of delay being exceptionally long, I had to bear in mind too that justice not only was the domain of a defaulting defendant, but also the plaintiffs.

In conclusion, taking into account all the factors presented above, I had no hesitation in allowing the plaintiff's preliminary objection, and accordingly dismissed the defendant's application with costs.

I have not touched on the issue whether the defendant should have appealed against the JID order, instead of alluding to this setting aside application, as none of the contending parties had submitted on this approach. I could only speculate that his unwillingness to appeal was either due to the fact that, "provisions were made for the setting aside (or varying) of any order" (O. 13 r. 8), or the period of setting aside had exhausted (O. 42 r. 13). Had there been no provisions promulgated to set aside, then, if still within the prescribed time, filing the necessary notice of appeal would have been the next best course of action (O. 56 r. 1). In the circumstances of the case as the defendant was out of time, applying for the JID to be set aside by invoking the judge's inherent jurisdiction was the most legally sensible thing to do. Success is a separate and different matter.